APPENDIX A.

Opinion of District Judge Nordbye on Remanded Proceedings.

ORDER.

This case comes before the Court on a rehearing of the suppression issue ordered by the Supreme Court in its opinion in the United States *vs.* Shotwell Mfg. Co., et al., under date of December 16, 1957. The ensuing delay in disposing of this issue as ordered by the Supreme Court is due primarily to the illness of one of the defendants which required continuances of the hearing.

Mr. Vincent P. Russo, Mr. Charles A. McNeils and Mr. Donald A. Hansen, Special Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the United States of America;

Mr. George B. Christensen and Mr. Neal J. McAuliffe, of Messrs. Winston, Strawn, Smith & Patterson, Chicago, Illinois, appeared in behalf of defendants Byron A. Cain and The Shotwell Manufacturing Company;

Mr. William T. Kirby, Chicago, Illinois, appeared in behalf of defendant Harold E. Sullivan.

The rehearing of the suppression issue was ordered by the Supreme Court by reason of the showing of the Government that the decision of the Court of Appeals in United States *vs.* The Shotwell Mfg. Co., et al., 225 F. 2d 394, in reversing the trial court upon the ground that it had failed to suppress the use of certain evidence produced

by the defendants, was based upon a fraudulent record before the trial court which was attributable to the defendants' own fraud. The supplemental hearing on defendants' motion to suppress the evidence in question was submitted on the additional evidence produced at said hearing, the record at the first suppression hearing, and the entire existing record of the trial when these moving defendants were found guilty by the jury of the offenses charged in the indictment. When the Court uses the term "defendants" it refers to the named defendants other than the defendant Huebner.

The showing before the Supreme Court as to the position of the defendants on the original motion to suppress is stated in the following language, 355 U. S. 233, 237.

> "* * * The substance of that position was presented by Leon J. Busby, Shotwell's accountant, who testified at both the hearing on the motion to suppress and at the trial. He stated that the Shotwell Company in each of the years 1945 and 1946 had received substantial cash payments for black-market candy sales above O. P. A. ceiling prices; that these receipts were not recorded on Shotwell's books and were not reported in its income tax returns; that he first learned of these facts in the course of conversations with H. Stanley Graflund, Shotwell's comptroller, during a trip they took to New York early in January, 1948; that immediately upon his return to Chicago he discussed the matter with respondents Cain and Sullivan; that he recommended disclosing the omissions to the taxing authorities; and that, at the direction of respondents, he revealed the entire affair to Ernest J. Sauber, Deputy Collector in Chicago, in a series of conferences beginning in the latter part of January 1948, at one or more of which conferences he was accompanied by Cain. He also testified that thereafter, acting under Sauber's instructions and assurances that only a civil liability was involved, he and his staff, with the assistance of Cain, Huebner and Graflund,

conducted an exhaustive investigation over a period of several months to reconstruct the Shotwell figures on the black-market transactions. He said that these figures were furnished in August 1948 to a revenue agent for scrutiny.

"Sauber and Cain gave similar testimony, except that Sauber fixed Busby's first visit to him at about the middle of March 1948. Cain's explanation of Shotwell's failure to report the black-market receipts in its income tax returns was that he believed such receipts were not taxable since they were used by Shotwell to purchase black-market supplies and therefore gave rise to no profit."

The Government's position was stated by the Supreme Court in this manner, p. 239,

"In support of its motion the Government has filed with the Court the affidavits of Huebner and Graflund, which they executed after the Government filed its petition for certiorari. These affidavits paint a sharply different picture of the entire affair, indeed, they flatly contradict the tale unfolded on behalf of the respondents in the District Court. More specifically: (1) Graflund swears that the first time he discussed the black-market transactions with Busby was at Busby's home in late June 1948, at which time Busby gave no indication that he had previously known of these transactions; (2) Graflund and Huebner swear that at no time prior to a meeting held in July 1948 were they ever advised or led to believe by respondents that Shotwell's black-market receipts had been disclosed to the Treasury; (3) Huebner swears that it was at this July 1948 meeting that Cain first told him that a voluntary disclosure would be made, and that Cain also gave him to understand that it had been 'agreed' that the date of the disclosure 'would be set at June 15, 1948'; (4) Graflund and Huebner swear that prior to the middle of July 1948 no work was done by anyone to assemble records or data for the purpose of making a disclosure to the taxing authorities,

and that the alleged offsetting payments for black-market supplies were in fact concocted 'out of thin air' at the July meeting; and (5) Huebner swears that in July and August 1948 he gave Cain $10,000 which Cain said he needed 'to fix the tax difficulty we were in'."

And in view of the newly discovered evidence as disclosed by the Government's showing, the Supreme Court made the following observation, p. 240,

"It is obvious that the Government's new evidence casts the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the respondents in the District Court; If true, it indicates that what the respondents have sought to represent in the District Court, the Court of Appeals, and in this Court as a voluntary disclosure, made in a timely manner and in good faith, was instead but a further step in a conspiracy to 'fix' Shotwell's tax difficulties, possibly involving the corruption of government officials, and certainly entailing an attempt to perpetrate a fraud upon the courts. Were we to undertake to review the Court of Appeals upon a record as suspect as this, we might very well be lending ourselves to the consummation of a fraud which may already have made the Court of Appeals its unwitting victim. In these circumstances it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less."

At the supplemental hearing, this Court heard the additional evidence proffered by the Government and that offered by the defendants. It is on the entire existing record, as heretofore stated, that this Court is now to determine the timeliness of the alleged voluntary disclosure and whether or not a bona fide disclosure was in fact ever made. Necessarily, the burden of proof rests on the de-

fendants to establish their motion. The Court is not unmindful, however, that in order to sustain a finding of fraud, the evidence must be clear and convincing. Concededly, the Court is confronted with a considerable task in attempting to ferret out the true facts from the welter of evidence in the three records and to make definitive findings on every disputed issue of fact.

Some fourteen years have elapsed since the black-market operations of Shotwell took place. No record was kept by Shotwell or any of its officials as to the premium moneys paid by Lubben and his companies during the years in question. It is conceded that thousands of dollars were paid to Shotwell by Lubben and his representatives as black-market payments on candy sold to Lubben and his companies during 1945 and 1946 without any attempt on the part of Shotwell to make any written record thereof. Consequently, it is perfectly understandable that when a witness like Huebner attempts to recount the some sixteen instances when he received substantial sums of money on behalf of Shotwell as over-ceiling payments on candy sold by that company, the amounts and circumstances as to the disposition of the money may not be too clear in his memory. However, the testimony he has given at the supplemental hearing is reasonably consistent and compatible with the testimony given by the government witnesses at the trial regarding these payments. Huebner did not take the stand at the first supplemental hearing nor during the trial; hence, his testimony as to the amounts of money received and the siphoning of these payments to various officials of the company in many instances discloses for the first time which individuals were the recipients of Lubben's payments. However, Huebner may be mistaken as to the exact amounts of money received and when the payments were made. Moreover, that Lubben may have exaggerated the amounts of the payments that

he and his confederates made to Shotwell is entirely probable. But the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use. The question of good faith does not turn on the exact amount of Lubben money Huebner, Sullivan or Cain may have received for their own personal use. That Cain personally received substantial amounts of the Lubben black-market payments and that Sullivan knew of these payments and received a certain share for his personal use, but in a lesser amount than Cain and Huebner, is fully established by the record. Neither Sullivan nor Busby took the witness stand at the supplemental suppression hearing.

As stated, there are two primary questions which the Court should determine on the record now before it; first that of the timeliness of any so-called voluntary disclosure made by Shotwell and these defendants, and second, whether or not a bona fide disclosure was made within the purview of the so-called voluntary disclosure doctrine.

It will be remembered that Busby, Shotwell's accountant, stated that he went to Sauber in January, 1948, and disclosed to him that Shotwell had failed to include as income the black-market payments received from Lubben when it made its tax returns for the years 1945 and 1946. Busby stated at the first suppression hearing that he was prompted to make the disclosure to Sauber at this time because he first learned of the Lubben-Shotwell over-ceiling transactions from Graflund when the two were together on a train coming from New York to Chicago. Graflund on several occasions prior to the supplemental suppression hearing

supported Busby's statement in this regard, but on the supplemental suppression hearing he testified that, in stating that he imparted this information to Busby in January, 1948, he was in error and that upon further consideration and reflection, he is now convinced that he did not tell Busby about the Lubben-Shotwell transactions until after Agent Krane had made a visit to the Shotwell plant on June 21, 1948. The explanation that Graflund has given as to why he has changed his mind in this regard is not too satisfactory, and my appraisal of the evidence leads me to the conclusion that it is very probable that Graflund did mention to Busby something about the black-market payments of Lubben to Shotwell when they were on the train together in January, 1948. When Agent Krane visited the Shotwell plant in June, 1948, Graflund telephoned that fact to Cain, who was in New York, and Cain became highly disturbed because Graflund had permitted Krane to inspect certain records at the Shotwell plant. Cain told Graflund that he had no business to turn over any of the records of Shotwell to an Internal Revenue agent, and criticized him severely for doing so. Krane's visit to Shotwell's plant was in connection with an investigation of the Lubben-Shotwell black-market transactions. In any event these circumstances prompted Graflund to get in touch with Busby at his home shortly after Krane's visit, and Graflund now testifies that it was on this occasion that he first disclosed to Busby the transactions with respect to the company's black-market dealings with Lubben. That there were two occasions when Graflund discussed this matter with Busby is entirely probable, and due to the lapse of time he now states in good faith that the first disclosure to Busby was at the time of his visit at Busby's home in June, 1948. The apparent falsity of Busby's statement that he first spoke to Sauber in January, 1948, about Shotwell's tax situation may well have caused Graflund to question the train episode as related by Busby.

Sauber testified that he was not interviewed by Busby regarding Shotwell's tax situation until March 15, 1948, or thereabouts. All the circumstances disclosed by the evidence convincingly indicate that Busby is wrong when he states that he and the Shotwell employees were working on figures for a voluntary disclosure from January, 1948, to June, 1948. The exact time that Busby made a visit to Sauber's office is difficult to pin point, and although the Government contends that it was not made until after the visit of Agent Krane to the Shotwell plant, my view from all the evidence is that it is fair to find that Busby did visit Sauber about Shotwell's taxes some time before Krane's visit. There is testimony of one Edmund B. Horgan, a former agent with the Internal Revenue department, who testified that at Sullivan's request on June 4, 1948, he called Sauber as to the delay in closing the Shotwell tax matter. Although it is difficult to understand why Sullivan became concerned, at that early date, over the so-called delay when no figures had as yet been presented to any revenue officials, the status of the alleged disclosure may have been unknown to Sullivan. It is reasonable to find that when Busby did visit Sauber, mention was made of Shotwell's black-market transactions and of its failure to include these receipts in its 1945 and 1946 tax returns. And it is entirely probable that Busby represented to Sauber, as told to him by Cain, that all of the black-market income was offset by premium payments which Shotwell had made for raw materials. Cain likewise may have visited Sauber with Busby prior to June 21, 1948, and the tax situation of Shotwell was discussed at these visits. It is fair to find from the evidence that Sauber informed Busby, as well as Cain, that it would not be necessary to file an amended tax return, but rather to disclose the entire black-market premium receipts and to make a computation of all the alleged offsetting premium

disbursements which Shotwell allegedly made for raw materials. And it is entirely probable that Sauber informed Cain and Busby that, if they made an honest, bona fide voluntary disclosure, there would be no criminal prosecution and that Shotwell would incur only a civil liability. However, no attempt was made by Busby or any of the officials of Shotwell to turn over to the Government any computations of the black-market receipts and alleged black-market outlays until after Krane's visit to the Shotwell plant on June 21, 1948. Cain's plans were to effect an early settlement of Shotwell's taxes before any government agents pried into the company's books and records. Now, Krane's visit was not prompted by any information imparted by Sauber to the Internal Revenue Department, and when Graflund permitted Krane to inspect some of the records during Cain's absence, then for the first time these defendants began to exert themselves in the preparation of their so-called voluntary disclosure for the Government's consideration. I do not mean to imply, however, that defendants had not attempted between January and July, 1948, to gain information as to Lubben's books and records and as to the data such records would disclose as to his contentions regarding the over-ceiling payments made to Shotwell. When Lubben began to have tax troubles, Shotwell's officials knew that their day of reckoning was not far distant.

It was not until some time in July, 1948, however, that any concerted effort was made by these defendants to make up a so-called voluntary disclosure. It is undoubtedly true that Cain, by reason of the lack of any records in Shotwell's possession, felt required to accept Lubben's figures of black-market transactions although he believed they were exaggerated. On the other hand, the alleged offsetting black-market payments made by Shotwell to wash out, so to speak, black-market receipts, were, as represented

to the Supreme Court by the affidavits of Huebner and Graflund, concocted "out of thin air." These figures were made up at a meeting in Busby's office in July, 1948, and at the Belden Stratford Hotel during that month, where Shotwell's representatives, including Cain, Huebner and Graflund, remained for some days in attempting to devise the amount of the black-market receipts to be offset by fictitious black-market disbursements in substantially the same amount.

Huebner testified at the supplemental hearing to the effect that no black-market receipts went into the so-called "corn box", which was the depositary for the moneys to be used for the purchase of raw corn, until some time after or during January, 1946. However, there is other testimony in the record which fairly indicates that the corn box may have been opened with some of Lubben's premium money during the Fall of 1945. It is not particularly important to determine on this hearing the exact period of the existence of the corn box or the exact amount of Lubben's money that was used to purchase raw corn. Suffice it to say that the evidence clearly establishes that only a relatively small percentage of the black-market payments made by Lubben to Shotwell were utilized for the purchase of raw corn, and whether the utilization of such premium money began in the Fall of 1945 or the early winter months of 1946 is not of any great moment on this motion. When these defendants presented the so-called voluntary disclosure by way of written computations of black-market income and black-market outgo, the amounts allegedly paid for raw materials were fictitious figures selected by Cain with full knowledge that they were without verity and merely inserted in the record in order to wash out, so to speak, the black-market receipts except for some $6,000. I find, therefore, that any so-called voluntary disclosure to Sauber by Busby and Cain prior to June 21, 1948, if it be

such within the purview of the voluntary disclosure doctrine, did not precipitate the investigation of the Lubben-Shotwell transactions by Krane and that it was not until after Krane's visit to Shotwell's plant that figures were presented to the Government allegedly showing the black-market receipts of Shotwell and Shotwell's alleged premium payments for raw materials. Obviously, therefore, whatever Busby and Cain may have told Sauber prior to June 21, 1948, regarding the failure of Shotwell to file an honest tax return for the years in question, Sauber contends that they failed to inform him that, instead of being utilized to pay for raw materials, a large amount of the premium overages "stuck to the fingers" of some of the officials of the company, which according to Huebner's testimony was the vernacular Cain employed in describing the Shotwell-Lubben transactions.

Prior to the first suppression hearing, it is apparent that Cain, Busby and Huebner had discussed the date which should be used as the time when the so-called voluntary disclosure was made to Sauber. Huebner apparently gathered from the conversation that June 15, 1948, was to be the date, in that that date would be at least a week prior to Krane's visit to Shotwell's plant. It seems evident that Huebner had not been taken into the confidence of Sauber, Cain and Busby regarding the date of disclosure as agreed upon, because after the testimony of Sauber at the first suppression hearing to the effect that he had been first visited by Cain and Busby on March 15, 1948, regarding the Shotwell tax situation, Huebner's surprise is evidenced by the remark that he made to Cain when they left the United States Court House after Sauber had testified, and when he said to Cain, "I thought the voluntary disclosure date was supposed to be June 15, 1948." Upon which Cain said to him, "Ssshhh! There is nobody that knows anything about this. Keep quiet." Cain denies that

he ever had this conversation with Huebner. My own appraisal of the testimony leads me to the belief that Huebner is honestly relating that episode. March 15, 1948, was just an arbitrary date which was agreed upon by Cain, Busby and Sauber in that the latter would testify that it was about that date when Busby first visited him. But obviously it was much later when Sauber was informed that Shotwell was the offending taxpayer. At the first suppression hearing, Cain testified that he was in California from March 11, 1948, to April 21 or 22, 1948. Busby testified at that same hearing that he was in California from March 16 to April 10, 1948, and that he was too busy with other tax matters to have seen Sauber on March 15, 1948.

Defendants urge that if any of the black-market money paid by Lubben went into the hands of the corporate officers by way of constructive dividends, it is immaterial as to the issue of good faith; that is, they urge that whether the black-market money went to officials of Shotwell or whether it went for the purchase of corn, or if some of the money was diverted for each of such purposes, the result taxwise would be the same in view of the public-announced policy of the Internal Revenue Department, which was adhered to until 1950, to the effect that, for tax purposes, over-ceiling payments for raw materials would not wash out the over-ceiling receipts of the taxpayer. Hence, defendants argue that taxwise, in view of the Internal Revenue Department's policy, Shotwell would be required to pay a tax on all of the black-market receipts as income whether they went into the black-market payments for raw materials or whether they went into the pockets of the corporate officers. In other words, the defendants contend that Shotwell would not, under the Commissioner's ruling, have been allowed a deduction from such gross receipts under either circumstance, and hence the identity of the ultimate recipients of Lubben's money was not necessary in

order to have a bona fide and good-faith voluntary disclosure. But that reasoning is not sound and is obviously specious. If all the black-market moneys received by Shotwell had been paid out by Shotwell for over-ceiling raw materials necessary to its candy manufacture, then such disclosure would have been an honest, forthright representation of the true facts. Under such circumstances Shotwell would have a right to challenge the Commissioner's ruling as to the non-deductibility of black-market payments for raw materials, and after payment of its tax, institute an action to recover the assessment imposed. However, if only a relatively small portion of the Lubben payments were expended by Shotwell for black-market raw materials and the balance diverted into the hands of the officials of the company by way of constructive dividends, then obviously the receipts by Shotwell from Lubben to the extent of such constructive dividends indisputably must be stamped as income to the company. In representing to the Government that all of the premium payments to Shotwell were expended for raw materials, these defendants made a dishonest, false and fraudulent disclosure, because such a disclosure did not conform to the true facts. The so-called voluntary disclosure was concocted for the express purpose of misleading the tax officials. It is true that the question of an honest disclosure does not, as the Court of Appeals held, necessarily turn upon the identity of the recipients of the black-market premium paid to Shotwell; that is, the defendants were not required to disclose the names of Richard Roe or John Doe as the alleged conduits through whom corn was purchased in order to obtain the necessary supply of corn syrup for Shotwell's candy manufacture. But if the unreported income was not disbursed for over-ceiling raw materials and hence offset, but was in fact received by Cain, Huebner and Sullivan, as the record amply establishes, then admittedly material facts

were not made known to the Government at the time of the disclosure, whether such disclosure be determined as taking place during some of the preliminary conversations between Cain, Busby and Sauber prior to June 21, 1948, the date of Krane's visit to the Shotwell plant, or when the actual figures of receipts and disbursements for 1945 and 1946 of black-market income and disbursements were later, and after June 21, 1948, presented by the defendants to the Government.

The Court of Appeals in its opinion, 225 F. 2d 395, 403, found that there was no inconsistency in making a disclosure that there was no tax due, stating in referring to the defendants,

> "While they coupled a disclosure of unreported income with a *legal* suggestion that that income was not taxable because it was offset by disbursements substantially equivalent thereto for over-the-ceiling purchases of raw material, contrary to the ten legal contentions of the Treasury Department, they did disclose the *facts*."

However, the record now persuasively establishes that the defendants never did disclose the true facts to the Treasury Department in that they failed to reveal that substantial amounts of the unreported income were diverted into the pockets of the officials of the company and falsely contended that substantially all of the black-market receipts were expended for over-ceiling purchases of raw materials. This is not only the Court's conclusion based upon the entire record, but it necessarily was the jury's conclusion on the record at the trial in that the jury was expressly instructed that, if the over-ceiling payments received by Shotwell were expended for raw materials in carrying on its candy manufacturing business, then its verdict must be one of not guilty.

There was evidence before the Court at the supplemental

suppression hearing that Cain had stated to Huebner in the Summer of 1948 that he had to have some $10,000 in order to "fix" Shotwell's tax case. Huebner testified that that sum of money was actually delivered by him to Cain for such alleged purpose. On this record, the Court cannot make a definitive finding as to whether or not any officials of the Government were actually bribed. However, I am convinced that this episode regarding the "fixing" of tax officials by Cain occurred as related by Huebner, and I also am convinced from this record that, in the Summer of 1948, Cain stated to Huebner that he had been able to settle Shotwell's tax difficulties for the sum of $20,000, whereupon Huebner was so relieved that he notified Graflund, who was on his vacation, of the good news. But Cain's plans in that regard went awry and no settlement was forthcoming. Of course, what caused the disruption of the proposed adjustment of Shotwell's tax on the basis Cain had indicated to Huebner is shrouded in some mystery. The record does disclose that Agent Lima, at his superior's direction, made a report in the Fall of 1948 designed to settle Shotwell's taxes for about $20,000. It seems improbable, however, that Agent Lima's report was to be the final adjudication of Shotwell's tax obligations, and I can only conclude on this record that some preliminary steps were taken by Lima to prepare a report which had for its purpose the settlement of Shotwell's tax deficiency in the amount indicated. Lima testified that he destroyed his report at the direction of a superior official after a meeting held in the Internal Revenue Department early in the Fall of 1948. His testimony ties in with Huebner's testimony that at about this time Busby told him that there had been a meeting in the fraud division of the Internal Revenue office about the Shotwell taxes; that papers were being destroyed and that "all hell had broken loose" in the department. The evidence in this regard strongly tends to illustrate the con-

nivance and lack of good faith in the so-called bona fide voluntary disclosure of Shotwell's tax deficiency. The machinations of defendant Cain in his attempt to defraud the Government permeate the entire record.

I am not unmindful that there are some glaring inconsistencies and contradictions which appear in the testimony of Huebner, Graflund and Lima in light of their prior statements and their testimony before the Grand Jury. Defendants urge that Huebner and Graflund, concerned with possible future criminal prosecution against them by the Government, and Lima, worried about his job, have wittingly or unwittingly followed the suggestions and pattern of events which zealous government officials may have attempted to inculcate. I have endeavored to make reasable allowances for the lapse of the years which dim memories, and to give due consideration to the claim of the defendants as to the interest of the revenue officers, and perhaps others, to encourage these witnesses to follow a chronology of events and circumstances which may support the Government's contentions as to what occurred during the years in question. However, I do not believe that any government official has attempted to have any witness herein testify falsely. That there was fear on the part of Huebner, Graflund and Lima as to the retaliation of the Government in view of their complicity in the fraud perpetrated is undoubtedly true. But to suggest that all of the diverted black-market money received by Shotwell from Lubben and his companies went to Huebner and that none of it was pocketed by Cain or Sullivan is simply incredible in light of the evidence. If these three witnesses, Huebner, Graflund and Lima, had not engaged in any questionable transactions in connection with Shotwell's tax problems, there would have been no occasion for them to fear government prosecution and to offer themselves as witnesses for the Government. There is no sound basis for

the suggestion that they are trying to frame Cain and Sullivan. Huebner and Graflund were not the men in charge of Shotwell's operations; they carried on their duties at the beck and call of their supervisors. Cain was the head of that institution and Sullivan came next in authority. In his testimony at the first suppression hearing, Cain stated that Huebner and Graflund were men of the highest integrity. The candid and self-incriminating admissions of Huebner that he received such substantial sums from the Lubben black-market payments and obtained therefrom some $45,000 for his own use, not only tends to corroborate Lubben's testimony, but also lends credence to the Government's position that he is trying to the best of his ability to tell an honest and straight-forward story as to the events that took place regardless of his own entanglement in this tax fraud. Errors or inconsistencies in Huebner's testimony do not, as defendants contend, discredit his entire testimony. The forthright attitude of government counsel to submit all prior statements and Grand Jury testimony of Huebner and Graflund to defendants' counsel indicates a commendable frankness in affording the Court all of the background which may bear upon their veracity.

Graflund never received one cent of Lubben's money for his own personal use. Whatever he did in connection with Shotwell's black-market transactions or in furtherance of any scheme to defraud the Government with respect to the alleged voluntary disclosure was dictated or suggested by his superiors. Regardless of the disagreements between his present testimony and his prior statements and Grand Jury evidence, I believe Graflund is attempting now to tell the truth as he remembers the events after the lapse of these many years.

On this record, in view of the convincing evidence, there must be a finding, and I do so find, that fraud permeated

the showing made by these defendants before me at the original suppression hearing, as well as at the trial and the supplemental hearing, and I find that no honest, bona fide voluntary disclosure to any government official ever was made by Shotwell or these defendants with respect to Shotwell's 1945 and 1946 taxes as contemplated by the voluntary disclosure policy in existence at the time. A dishonest and false disclosure cannot be held to be a timely voluntary disclosure.

The above may be considered as the Court's findings of fact, and as conclusions of law I find that defendants' motion to suppress must be, and the same hereby is, in all things denied. It is so ordered. Exceptions are reserved.

Dated this 15th day of April, 1959.

GUNNAR H. NORDBYE,
United States District Judge.

APPENDIX B.

Opinion of Court of Appeals for Seventh Circuit.

February 8, 1961.

Before DUFFY and SCHNACKENBERG, *Circuit Judges*, and GRUBB, *District Judge*.

SCHNACKENBERG, *Circuit Judge*. Harold E. Sullivan, Byron A. Cain and The Shotwell Manufacturing Company, a corporation, defendants, have appealed from judgments of the district court entered May 22, 1959, based on a jury verdict entered in 1953, adjudging each of them guilty of attempting to defeat and evade the payment of taxes owing by Shotwell, in violation of 26 U.S.C. § 145 (b), Int. Rev. Code of 1939.[1]

These judgments were entered by the district court following a hearing held pursuant to an order of the United States Supreme Court. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 246. By the same order the Supreme Court vacated our judgment reversing prior judgments of the district court based on said verdict, *United States* v. *Shotwell Mfg. Co.*, 225 F. 2d 394, 406.

We held on the prior appeals that it had been shown, at a pretrial hearing on a motion of defendants to sup-

1. Harold E. Sullivan was sentenced to prison for 3 years and fined $2500 on each of counts 1 and 2, the terms of imprisonment to run concurrently. Shotwell was fined $10,000 on each count and Byron A. Cain was sentenced to imprisonment for 3 years and fined $5,000 on counts 1 and 2, the terms of the imprisonment to run concurrently.

press certain evidence, that a valid, timely, voluntary disclosure by defendants had been made. After the government petitioned the Supreme Court for certiorari to review our decision, it filed a motion to remand on the ground of newly discovered evidence, and in support of its motion filed the affidavits of defendant Frank J. Huebner[2] and H. Stanley Graflund, which the Court found contradicted the testimony on behalf of defendants on the suppression hearing. At 240, the Supreme Court stated that the new evidence cast the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the defendants and entailed an attempt to perpetrate a fraud upon the courts. At 241, the need of a remand to the district court for a full exploration was indicated. At 245, the Court directed that, in the further proceedings in the district court, the additional evidence to be presented be confined to the suppression issue and that on that issue the district court make such new findings of fact as may be appropriate, including findings on the question of the timeliness of the alleged disclosure.[3]

At the hearing upon remand, the district court heard the testimony of government witnesses Huebner, Graflund, Earnest C. Wright and Joseph M. Lima and the testimony of defendant Cain and several other defense witnesses. Sullivan and Leon J. Busby did not testify, although Busby did testify at the original suppression hearing.[4] The court entered an order which included a comprehen-

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2. Huebner had been sentenced to 3 years imprisonment and fined $2500 on each count, the terms to run concurrently.

3. While, upon oral argument in this court on the present appeals, government counsel expressly stated that the government makes no contention that the disclosure of defendants was untimely, the Supreme Court, at 245, note 21, pointed out that new evidence of timeliness is relevant to the question of whether a bona fide disclosure was in fact ever made.

4. 225 F. 2d 394, 399.

sive findings of facts. The trial judge analyzed the testimony of the various witnesses and found specifically, *inter alia*:

> the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben[5] during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use.
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> * * * Busby, Shotwell's accountant, stated that he went to Sauber[6] in January, 1948, and disclosed to him that Shotwell had failed to include as income the black-market payments received from Lubben when it made its tax returns for the years 1945 and 1946. Busby stated at the first suppression hearing that he was prompted to make the disclosure to Sauber at this time because he first learned of the Lubben-Shotwell over-ceiling transactions from Graflund when the two were together on a train coming from New York to Chicago. Graflund on several occasions prior to the supplemental suppression hearing supported Busby's statement in this regard, but on the supplemental suppression hearing he testified that, in stating that he imparted this information to Busby in January, 1948, he was in error and that upon further consideration and reflection, he is now convinced that he did not tell Busby about the Lubben-Shotwell transactions until after Agent Krane had made a visit to the Shotwell plant on June 21, 1948.
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> It was not until some time in July, 1948, however, that any concerted effort was made by these defendants to make up a so-called voluntary disclosure.

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5. David G. Lubben, a witness on behalf of the government.

6. Ernest Sauber, chief deputy collector of internal revenue in Chicago

It is undoubtedly true that Cain, by reason of the lack of any records in Shotwell's possession, felt required to accept Lubben's figures of black-market transactions although he believed they were exaggerated. On the other hand, the alleged offsetting black-market payments made by Shotwell to wash out, so to speak, black-market receipts, were, as represented to the Supreme Court by the affidavits of Huebner and Graflund, concocted "out of thin air." These figures were made up at a meeting in Busby's office in July, 1948, and at the Belden Stratford Hotel during that month, where Shotwell's representatives, including Cain, Huebner and Graflund, remained for some days in attempting to devise the amount of the black-market receipts to be offset by fictitious black-market disbursements in substantially the same amount.

* * * Suffice it to say that the evidence clearly establishes that only a relatively small percentage of the black-market payments made by Lubben to Shotwell were utilized for the purchase of raw corn, * * *. When these defendants presented the so-called voluntary disclosure by way of written computations of black-market income and black-market outgo, the amounts allegedly paid for raw materials were fictitious figures selected by Cain with full knowledge that they were without verity and merely inserted in the record in order to wash out, so to speak, the black-market receipts except for some $6,000. I find, therefore, that any so-called voluntary disclosure to Sauber by Busby and Cain prior to June 21, 1948, if it be such within the purview of the voluntary disclosure doctrine, did not precipitate the investigation of the Lubben-Shotwell transactions by Krane and that it was not until after Krane's visit to Shotwell's plant that figures were presented to the Government allegedly showing the black-market receipts of Shot-

well and Shotwell's alleged premium payments for raw materials.[7]

Accordingly the court found "... that fraud permeated the showing made by these defendants before me at the original suppression hearing, as well as at the trial and the supplemental hearing, and I find that no honest, bona fide voluntary disclosure to any government official ever was made by Shotwell or these defendants with respect to Shotwell's 1945 and 1946 taxes as contemplated by the voluntary disclosure policy in existence at the time. A dishonest and false disclosure cannot be held to be a timely voluntary disclosure."

1. In *United States v. Johnson*, 327 U. S. 106, where defendant made a motion for a new trial based on newly discovered evidence, said to prove that one Goldstein, a government witness, had perjured himself, the trial judge found that none of the affidavits offered in support of the motion showed perjury on the part of Goldstein and concluded that a new trial was not warranted. A reversal by our court of his action was set aside by the Supreme Court, which held, at 111, that, while we might intervene when findings of fact are wholly unsupported by evidence, we should never do so where it does not clearly appear that the findings are not supported by any evidence.

Of course, the Supreme Court has not passed upon the correctness of the result we reached on the record before us on the former appeals, 225 F. 2d 394. We are now re-

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7. The district court at this point added in its order the following:

"This is not only the Court's conclusion based upon the entire record, but it necessarily was the jury's conclusion on the record at the trial in that the jury was expressly instructed that, if the over-ceiling payments received by Shotwell were expended for raw materials in carrying on its candy manufacturing business, then its verdict must be one of not guilty."

quired to again pass upon defendant's motion to suppress, based, however, upon a record since supplemented by the proceedings upon remand. Therefore, giving proper recognition to the additional findings of fact of the district court, we proceed to a disposition of all contentions now awaiting resolution.

In accordance with the findings of the district court, we are required to, and do hereby, hold that the defendants' motion to suppress evidence was properly denied.

2. This conclusion is not impaired by defendants' contention that the government failed to show that the decision of this court was based upon a perjurious record attributable to fraud of the defendants, nor their assertion that the "story" advanced by Huebner and Graflund "was so startling and dramatic that the Court noted a doubt as to whether the affidavits might be 'products of fraud'." The district court on remand clearly considered relevant testimony of the defendants untrue and in effect absolved the affidavits of Huebner and Graflund of the charge of fraud.

We hold that the district court on remand proceeded responsively to the Supreme Court's direction and that its use, at 235, of the words "perjurious record" obviously refers to the "shadow upon the truthfulness of the disclosure testimony" given by or on behalf of defendants, as referred to, at 240. This disclosure testimony was fully discussed by the district court in its findings on remand.

3. Defendants insist that the district judge erred in not having recused himself from the 1958 proceedings. Subsequent to the trial the judge made certain statements as to the credibility of witnesses, the nature of disclosures and inferences which he drew from the evidence. Defendants charge that it appears that he had fixed views on the subject of disclosure. However, it is not

contended that he entertained personal as distinguished from judicial bias or prejudice against defendants. Therefore, we hold that his statements were insufficient as a matter of law to require an order of recusation. *Tucker v. Kerner*, 186 F. 2d 79, 84, 7 Cir.

4. It is maintained that the district court acted arbitrarily in denying defendant Cain's motion for severance during the proceedings on remandment. His motion was supported by the affidavits of two physicians and had to do with the state of his health. The record shows that, after hearing argument on the motion, the court ordered Cain to submit to physical examination at the Public Health Service facility in Chicago. Thereafter the chief of the medical service, Dr. I. N. Zigler, submitted to the court a report of his examination and recommended a postponement of the hearing for six months "for maximum possible improvement and stabilization of Mr. Cain's cardiac status." Such postponement was had. Several months later Dr. Zigler reported to the court that Cain's appearance for four or five hours a day would not unreasonably exceed his level of tolerance. Cain renewed his motion and submitted affidavits of two physicians. In view of a conflict in the medical testimony, by agreement of counsel, the court appointed two physicians to examine Cain and advise the court as to his ability to attend the further hearing. That was done and their reports are in the record. The court denied a motion for further postponement. The reports justified this action.

We cannot say that the court's action was arbitrary or the result of an abuse of discretion.[8]

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8. It should be noted that Cain's continued presence at the hearing of the motion for suppression was not required by Rule 43 of the Federal Rules of Criminal Procedure. 18 U. S. C. A., Rule 43.

5. In July 1957, almost four years after the verdict, appellants, alleging newly discovered evidence, filed amended motions to dismiss the indictment and in arrest of judgment, for the purpose of challenging the arrays of the grand and petit juries on the ground that the panels were illegally constituted.

Defendants contend that the arrays of the grand jury and the petit jury were improperly selected because "volunteers are not competent as jurors in Illinois and therefore were not competent federal jurors in 1952 and 1953," and "the jury commissioner delegated his non-delegable duties."

Rule 12(b) (2) and (3), Federal Rules of Criminal Procedure,[9] reads:

> (b) The Motion Raising Defenses and Objections.
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> • • • • • •
>
> (2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. • • • Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. • • •
>
> (3) Time of Making Motion.
> The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

In denying the motions, which ruling defendants now say was erroneous, the district court held that defendants "failed to establish any sufficient grounds which [would] justify the granting of relief from the waiver." However, exhibiting an extraordinary desire to cover all points, he

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9. 18 U. S. C. A., Rule 12 (b) (2) and (3).

then found that the jurors, grand and petit, possessed the necessary legal qualifications for jury service and that no one was excluded because of race, color, economic status, political conviction, geographical location, religious beliefs or social status, and that there was no showing that the use of volunteers to the extent of one member of the petit jury and five members of the grand jury, precluded defendants from having a grand jury or a trial jury truly representative of a cross-section of the community, or that the use of volunteers resulted in the intentional or negligent exclusion or discrimination against any individuals or groups.

Inasmuch as defendants have not shown that these findings are without support in the record or that they were actually prejudiced by the method by which the jurors were selected, we hold that their motions were properly denied. *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414, 427, 3 Cir. See *United States* v. *Smith*, 253 F. 2d 95, 7 Cir. Cf. *Glasser* v. *United States*, 315 U. S. 60, 86.

6. Defendants contend: "If the evidence taken in the light most favorable to the Government fails to prove an essential element of the crime charged, no matter what else it may have tended to prove, the convictions must be reversed." This amounts to a challenge of the sufficiency of the evidence to support the verdict. We hold that the evidence, viewed in the light most favorable to the government, is sufficient to sustain the verdict.

7. Defendants assert that the district court should have granted a new trial in 1953 for additional errors committed at the trial.

First, we hold that, before the jury, a certain part of Cain's testimony at the suppression hearing was not improperly introduced, because it was in effect an admission against interest that Shotwell's unreported black-market receipts approximated $400,000.

Secondly, defendants charge that the court should have excluded certain documents described as "disclosure recapitulations", which were offered by the government on the cross-examination of Cain and also in rebuttal. Defendants insist that these documents were inadmissible because they constituted an offer in compromise. However they were not executed for that purpose, as Cain testified at the time that Shotwell was ready and willing to pay the full amount of tax claimed by the government and that it would endeavor thereafter to recover what it could. We hold that this evidence was admissible. A distinction is drawn between an offer to do something in furtherance of a compromise, which is held to be inadmissible, and independent admissions of fact, which may be admitted. Cf. *Cooper* v. *Brown*, 126 F. 2d 874, 878, 3 Cir.

Thirdly, defendants insist that the court erred in denying their motion to strike certain parts of Lubben's testimony and various exhibits, including books of account, introduced by the government. They argue that allowing all the testimony as to over-invoice payments during the entire two years tended to convict the individual defendants of evasion of personal income taxes and confused questions of corporate and individual income.

Both sides refer to Lubben's testimony as to shipments of candy by Shotwell to Lubben, and admit that he testified that when he paid over-ceiling cash premiums to Huebner, Shotwell's general manager, Huebner counted the currency into three piles, saying one was for himself, one for Cain, and one for Sullivan.[10] Lubben's books were admitted into evidence and defendants contend that they were not regularly kept so as to import verity according to legal standards. Defendants also assert that the testi-

10. Certain evidence offered by the government, such as the "three-pile" testimony was not admitted as to Sullivan. *Post* 11.

mony of Lubben completely destroyed the evidentiary basis for the books as showing payments of overages to Shotwell. This is not a case where a cause of action was based upon the books of account and hence precise compliance with the law as to the keeping of records was not required. The issues in this criminal case were to be decided by the jury upon all of the relevant evidence, which included, *inter alia*, these books, which admittedly were not perfect. The weight to be given to them, in connection with the other evidence, was for the jury to decide. The books were offered as proof of a part of a factual situation and were to be considered for what they were worth. There was no error in refusing to strike this evidence.

We are convinced that these attacks on Lubben's testimony and his books of account, as evidence, relate to the weight to be given to evidence rather than its admissibility. No error is shown in these respects.

Fourthly, defendants complain that their cross-examination of Lubben was unreasonably curtailed.

Our examination of the record refutes this complaint. While the extent of cross-examination is within the sound discretion of the trial court, *Alford* v. *United States*, 282 U. S. 687, 694; *Glasser* v. *United States*, 315 U. S. 60, 83, the record demonstrates that, not only was there no abuse of discretion here, but the court allowed extreme latitude to all three defense counsel who cross-examined Lubben, over a period of four days. It is obvious that the court imposed limitations upon inquiries which related to irrelevant transactions of Lubben with other parties.

Fifthly, defendants contend that there was error in the giving and refusal of instructions.

They say that fundamental errors were carried into the instructions which "specifically told the jury they could

take Lubben's so-called records into account in determining whether the overages constituted income to Shotwell".

They say that the "crushing effect of the charge can be appreciated only be reading it in its entirety". We have read it. The court was engaged in informing the jury as to the contentions of the parties and he made it plain that that was the purpose of his statement. We believe that he succeeded in making a simple and clear explanation which was understandable to the jurors. While admitting that the court stated that he was merely reciting the government's contentions, defendants insist that the court nowhere made any clear and understandable delineation, as he easily could and should have, between what was strictly government contention and what he was assuming as an undisputed fact or an undisputed principle of law. We have no reason for the assumption implicit in defendants' contention, that there was such a lack of intelligence upon the part of the jurors as is needed to conclude that they must have disregarded the orderly sequence and division of the judge's charge, *United States* v. *Bruswitz*, 219 F. 2d 59, 63, 2 Cir., cert. denied, 349 U. S. 913.

Defendants criticize this part of an instruction:

> "• • • It is the taxable income of individuals, partnerships and corporations which forms the principal revenue for the support of the Government. The wilful violation of the income tax laws of the land is, therefore, a matter of great concern to the Government, and those guilty of such an offense and proven to be guilty should be speedily found guilty by a jury chosen in such trial."

They say that it reads like a prosecutor's argument. However, the quoted language is lifted out of context. The following language preceded that quoted:

> "I take it, members of the jury, that it is not neces-

sary for me to remind you that this case is important. It is important to the Government. *It is important to these defendants.*" (Italics supplied.)

We are certain that the jury understood that the court was merely impressing it with the important duty which the jury was called upon to perform and its consequent effect upon both the government and the defendants on trial. We see no error here.

Defendants charge that the court's instruction relative to the disclosure claimed to have been made by the defendants was grossly prejudicial. On that issue defendants tendered this instruction:

> "In determining whether the defendants, Byron A. Cain, Harold E. Sullivan, Frank J. Huebner and The Shotwell Manufacturing Co., or any one or more of them had a specific intent to defeat or evade taxes owing to The United States from the corporate defendant at the time the tax returns of the corporate defendant for the years 1945 and 1946 were filed, you may take into account, together with all other evidence bearing on the issue of intent, the actions of the defendants pursuant to the voluntary disclosure policy."

The court endorsed thereon the words "Granted in Substance". It however gave to the jury instead, the following instruction:

> "The fact that the defendants may have assumed that their disclosure granted immunity to the Shotwell Company, and to the individual defendants herein, is no defense in this proceeding, and as I have stated, and I repeat again, it is only material in so far as it may bear upon the intent of the individual defendants, or the intent of the Shotwell Company to violate the income tax laws, and their good faith, or lack of good faith in doing that, which they did do in reference to their alleged disclosure, and in so far

> as it may have a bearing upon any of the acts, admissions, conduct et cetera, which may have taken place during such alleged disclosure."

Both the tendered instruction and the given instruction were meant to submit to the jury the question of defendants' intent in the matter. We find no basis for error that the court gave to the jury but one of them, which itself was correct.

We hold that no error was committed in the court's refusal to grant a new trial to defendants.

8. In their briefs, defendants Shotwell and Cain contend that it was the duty of the district judge to order a new jury trial, when, on the hearing on remandment, he found Lubben's testimony was "exaggerated". This simple as well as direct approach to their objective is based upon their characterization of the word "exaggerated" as a mere euphemism for perjury. The government, in its brief, contents itself by ignoring this contention. While we do not ignore it, we find it unconvincing. The court did state on remandment

> "• • • that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable."

We cannot say that this amounts to a charge of perjury. Suffice it to say that Lubben's testimony was not the only evidence to support the verdict and the judgments. Moreover his credibility was a question for the jury. The court did not err in not ordering a new trial because of these facts.

9. In this court a separate brief has been filed by defendant Harold E. Sullivan.[11] He was a director and gen-

11. While much of this opinion has obviously referred to all of the defendants, this division relates principally to defendant Sullivan.

eral counsel for Shotwell at a salary of $600 a week. On July 1, 1946 he became executive vice-president. He practiced law and was a master in chancery of an Illinois court. He and his family owned 20%, and later 33%, of Shotwell's stock.

In September or October 1946, in Sullivan's office on Dearborn Street, Chicago, Lubben talked with Sullivan, who told him that he wanted no checks and asked whether the cash transactions were being recorded in Lubben's books. He was assured that they were not. Sullivan said, "Well, Dave, you know how it is. You have * * * a farm in New Jersey. This money I have been using in my farm. * * * I am getting a new driveway, * * *. That is the only way I can do it today, with the tax situations the way they are."

Both Cain and and Sullivan repeatedly impressed upon Lubben that the corporation was not reporting the cash receipts as income, and that no records of his cash payments should be kept. Lubben did in fact make and retain some record of many of the payments.

Martin A. Erieson, Shotwell's shipping superintendent, testified that Sullivan was present in March 1946 when there was a conversation to the effect that, when shipping candy to Lubben, the name "ABC Company" was to be put on the bills of lading as shipper instead of Shotwell.

Howard Roser, comptroller of Shotwell, testified that the monies put in a cash box he gave out to Sullivan, Cain and Huebner.

As a witness, Sullivan denied that he personally received any of the cash paid by Lubben.

The government contends that, viewing the record in the light most favorable to the government, there is ample evidence to support the verdict as to Sullivan. On the other hand, Sullivan contends that the government's case

against him was based upon a single alleged admission which the government's principal witness Lubben said Sullivan made to him in Sullivan's office.[12] We are of the opinion that the jury was warranted in finding from the direct and circumstantial evidence in the record, and the inferences which might be reasonably drawn therefrom, that Sullivan's acts, statements and his status in the management of Shotwell, coupled with his knowledge of its operations with Lubben, made him aware of and a participant in the acts constituting the offenses charged in the indictment.

10. Certain evidence was admitted but the jury was instructed by the court not to consider it against Sullivan. This evidence related to the "three-pile testimony", the recapitulation statements and extracts from Cain's testimony at the suppression hearing. When this evidence was admitted the court admonished the jury that it was not to be considered against Sullivan. From time to time, the court repeated this admonishment at the request of counsel for Sullivan. The court also in its final instructions informed the jury:

> "Any statement or act of any of the defendants not in the presence of another defendant is not binding upon the absent defendants, even though one or more of the defendants were mentioned in the conversation, nor are such matters competent evidence against any other defendant not present. I have limited, you will observe, certain evidence during the trial, from time to time, as being competent only as to certain defendant or defendants, that is, by way of example, what Mr. Huebner, or Mr. Cain may have said or done in the absence of Mr. Sullivan, would not be binding or competent as to Mr. Sullivan. * * *"

12. The date of this admission was first given as February 14, 1946 and later corrected by the witness Lubben and fixed as September or October, 1946, *ante* 13.

These limiting instructions are clear. It must be presumed that the jury conscientiously observed them. *United States* v. *Harris*, 211 F. 2d 656, 659, 7 Cir., cert. denied 348 U. S. 822.

11. Sullivan argues that it was error for the court to instruct the jury as follows:

> "Under our laws, every defendant who is charged with a crime is presumed to be innocent. Now, that presumption remains with him throughout the entire trial, until that time, if that time is reached, that the Government has established his guilt beyond a reasonable doubt. The defendants here are entitled to the benefit of that presumption, and it is for you to determine, members of the Jury, whether or not the guilt of any of the defendants has been established beyond a reasonable doubt."

While there is language in this instruction which was termed "inept" in *Lurding* v. *United States*, 179 F. 2d 419, 422, 6 Cir., "unless accompanied by some instruction that directs a consideration of all the evidence", here the jury was repeatedly directed to consider *all* the evidence.[13]

13. For instance, the court instructed the jury:

> "On the other hand, if you do not have after a full and fair consideration of all the evidence and testimony, an abiding conviction of the guilt of any defendant charged herein, amounting to a moral certainty, then the guilt of such defendant has not been established as the law requires, and it would be your duty to return a verdict of not guilty as to such defendant or defendants."
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> * * * * *
>
> "'Direct proof of wilful intent is not necessary. * * * It is a question of fact, members of the jury, to be determined from all of the evidence."
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> * * * * *
>
> "* * * The truth as to when the overages began, their duration, and their amount is a matter, and an important matter, which you will have to determine from all the evidence introduced."
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> * * * * *
>
> "'Well, members of the jury, you will have to determine the

We have considered all of the alleged errors urged by defendants and we find that none of them would justify reversal. On the complete record now before us, we are required to affirm the judgments from which appeals have been taken by Sullivan, Cain and Shotwell.

JUDGMENTS AFFIRMED.

true, the believable and the plausible and reasonable facts in that regard from all the evidence which you have heard. * * *

* * * * *

"The question is, therefore, members of the Jury, whether you are convinced from all the evidence that there were taxes due the Government for the years in question in amounts substantially higher than those reported and paid by the corporation to the Government, and whether you are convinced from all the evidence, beyond a reasonable doubt, that there was a wilful attempt by the defendants, or any of them in such years to evade or defeat any substantial part of such income tax by filing or causing to be filed a false and fraudulent return for the corporate defendant for the years in question."

* * * * *

"* * * You have a right to make use of your own common observations, and experience, as men and women in the affairs of life and consider all the evidence in the light of your common observations and such experience, and ascertain where the truth may be on any material fact in this case."

* * * * *

"* * * If you find upon an impartial consideration of all the evidence in the case that the evidence supports and sustains two reasonable theories and that one of such theories is consistent with the guilt of the defendant, and that the other such theory is consistent with the innocence of the defendant, then the law makes it your duty to adopt the theory that is consistent with the innocence of said defendant and find him not guilty."

APPENDIX C.

Opinion of District Court With Respect to Jury Selection Procedures

ORDER.

Defendants The Shotwell Manufacturing Company, Byron A. Cain, and Harold E. Sullivan have filed a motion for leave to withdraw their respective pleas of not guilty and to file instanter (1) an amendment to their motion to dismiss the indictment herein; (2) an amendment to their motion for a new trial; (3) an amendment to their motion in arrest of judgment; and (4) an amendment to their motion for judgment of acquittal notwithstanding the verdict.

Mr. George B. Christensen, of Chicago, Illinois, appeared in behalf of The Shotwell Manufacturing Company and Byron A. Cain;

Mr. William T. Kirby, of Chicago, Illinois, appeared in behalf of Harold E. Sullivan;

Mr. Vincent P. Russo, Special Attorney, Department of Justice, Washington, D. C., appeared in behalf of the United States of America.

The proposed amendments to the original motions are all predicated upon alleged newly discovered evidence not known to the defendants and which was not reasonably to be anticipated or discovered by them at the time of the filing of their original motions herein. The alleged newly discovered evidence upon which the motions to amend are

based may be summarized as follows: (1) The array of grand jurors which indicted these defendants did not constitute a fair cross-section of the community; (2) the officials in charge of the jury selection procedures of this Court utilized methods in the selection of the grand jurors who indicated these defendants whereby they arbitrarily, intentionally and systematically excluded various classes of people residing within the jurisdiction of this Court who were eligible and qualified for general jury service; (3) the officials in charge of the jury selection procedures of this Court utilized methods in the selection of the grand jurors who indicted these defendants whereby discrimination was practiced against various classes of people who were eligible and qualified for general jury service; and (4) the officials in charge of the jury selection procedures of this Court illegally and improperly delegated their duties in connection with the selection of the grand jury which indicted these defendants.

Later, the defendants amended their amended motion by alleging that the newly discovered evidence included errors in the selection of the petit jury; that is, it is charged that the petit jury finally selected in the trial of these defendants was not lawfully constituted; that the jury contained persons incompetent to serve as jurors under the law of Illinois and of the United States; and that the members of the venire and the jury were initially selected through discriminatory and illegal practices of the Clerk and the jury commissioner and through an unlawful delegation of the powers of the jury commissioner. The parties stipulated that the motions be submitted on the record of the proceedings before the Honorable John P. Barnes, United States District Judge, Northern District of Illinois, as such proceedings appear in the appendix in support of a petition for a writ of mandamus filed in the United States Court of Appeals for the Seventh Circuit

in Harold E. Sullivan, et al., Petitioners *vs.* United States District Court, Respondent, No. 12,140; the affidavit and supplemental affidavit of Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, dated February 17, 1958, and May 1, 1958, respectively; and the testimony of Richard Jongsma given before this Court on April 21, 1958.

At the outset, it should be stated that the indictment herein was filed on March 14, 1952. The defendants were arraigned on June 24, 1952, and entered pleas of not guilty. The trial commenced on September 15, 1953, and was concluded on October 16, 1953. Thereafter, the motions which are now sought to be amended were made and denied, sentences were imposed, appeals were taken, and on June 15, 1955, the Court of Appeals for the Seventh Circuit reversed the judgments, with instructions to sustain defendants' motions, as amended, to suppress evidence, and to retry the case. On writ of certiorari to the United States Court of Appeals for the Seventh Circuit, the United States Supreme Court on December 16, 1957, vacated the judgment of the Court of Appeals and remanded the case to the District Court for proceedings consistent with the opinion. The proceedings now before this Court are limited to the so-called suppression issue. However, the defendants on July 9, 1957, filed their motion for leave to withdraw their respective pleas of not guilty and to file amendments to their original motions as noted above. These motions, as amended, therefore, are now before me and are defendants' first challenge to the grand jury and the petit jury array or panel as indicated above.

Defendants style their motions as being based upon newly discovered evidence. Of course, any errors in the selection of the grand or petit jury are not newly discovered evidence within the ordinary meaning of that term. No objection was made to the membership of the petit

jury when it was finally obtained. The men and women who comprised the jury evidently satisfied the defendants as to its composition. No contention was made that the jury was not a "body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130. Nor is there any showing now that the jury did not "comport with the concept of the jury as a cross-section of the community." *Glasser* v. *United States*, 315 U. S. 60, 86. Defendants are attempting to challenge the jury panels, grand and petit, in a collateral proceeding under the guise of newly discovered evidence. Any right to *make such an attack* has been waived. See *Tracy* v. *Terminal R. Assn. of St. Louis*, 8 Cir., 170 F. 2d 635, 640, and cases cited therein. In addition, attention may be called to Rule 12(b)(2), Federal Rules of Criminal Procedure. This rule provides:

> "Defenses and objections based on defects in the institution of the prosecution, or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

There is an absence of any showing here which would justify the Court in granting relief from the waiver. It is true that the defendants contend that they were not apprised of the alleged improprieties in connection with the composition of the grand jury until shortly before they filed their motion. But the method of selecting jurors in this District by the Clerk and jury commissioner had been followed for years. Inquiry as to the system employed could have been made at any time. Indeed, there was publicity as to some phases of the jury selection which appeared in the Press; that is, as to volunteers being accepted by the officials. The same observation may be made with reference to the composition of the petit jury.

The defendants do not contend that any irregularities in the selection of the grand jury resulted in any prejudice, nor is there any showing that the grand jury did not truly represent a cross section of the community. The Court concludes that the defendants have failed to establish any sufficient grounds which justify the granting of relief from the waiver.

But notwithstanding the Court's view that the defendants have lost their right to withdraw their pleas of not guilty and to urge the motions based upon the alleged errors in the selection of the grand and petit juries, brief comment will be made as to the factual situation which is urged by defendants in support thereof.

During the years in question, federal jurors, both grand and petit, were required under federal statutes, among other things, to be competent to serve as jurors under the laws of the State in which the District Court is held. The statutes of Illinois required that in counties of over 110,000 inhabitants, jurors are to be chosen by jury commissioners who are required to prepare jury lists from 'voters' lists. Apparently the Clerk of Court and the jury commissioner in the Northern District of Illinois, for many years prior to the return of the indictment herein, had not followed that practice. These officials obtain jurors largely from five sources: (1) The membership lists of private organizations; (2) nominations by postmasters in areas outside of Cook County; (3) telephone directories; (4) nominations made by former jurors; and (5) volunteers. In following this method of selecting jurors, it clearly appears that both the Clerk of Court and the jury commissioner took pains to obtain a jury representative of the economic, social, religious, racial, political and geographical groups in the District. Questionnaires were sent to all prospective jurors, and depending upon the answers given therein, the officials determined whether the persons

would be suitable jurors. Consequently, although the method employed by the Clerk of Court and the jury commissioner in selecting jurors did not strictly comply with the state law, in that sources other than voters' lists were utilized, the jurors, grand and petit, possessed the necessary legal qualifications for jury service. Lists of prospective jurors were obtained from church organizations, labor groups, clubs, and, as stated, recommendations were received from former jurors and postmasters, and resort was made to telephone directories for supplemental names. But the officials made the decision as to which names went into the jury box. No one was excluded because of his race or color, economic status, political convictions, geographical location, religious beliefs, social status, or because he was rich or poor. This method of selecting jurors was sanctioned in *Scales* v. *United States*, 4 Cir., 227 F. 2d 581, 592; *Walker* v. *United States*, 8 Cir., 93 F. 2d 383, 391; *United States* v. *Brandt*, D. C. Ohio, 139 F. Supp. 349, 360.

Under the circumstances disclosed herein, as indicated in *Glasser* v. *United States*, *supra*, p. 86, "Officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called." Blindly selecting names from voters' lists, without more, would afford scant information which would enable the officials to determine whether any array of jurors were truly representative of a cross-section of the community. The utilization of voters' lists for prospective jurors would insure a list of citizens but would afford no other aid in obtaining a representative jury. There is no showing here that either the personnel of the grand jury in question which indicted these defendants, or the petit jury before whom they were tried, did not fulfill the essential characteristics which have made the American jury system one of the cherished features of our institutions.

Glasser v. *United States*, *supra*, p. 86. It is to be doubted that defendants have a vested right in any specified method of selecting jurors if the means utilized affords them the type of jury that the law contemplates. In view of the discretion which is necessarily lodged in officials who compile jury lists, it seems apparent that the jurors selected from the sources indicated above would not be incompetent under the state law. *United States* v. *Dennis*, 2 Cir., 183 F. 201, 221. I find, therefore, no merit to defendants' contentions that their motions should be granted merely because the officials did not make up their jury lists solely from voters' lists. No Illinois case has been cited which supports defendants' position that state jurors obtained by a jury commissioner from sources other than a voters' list renders such jurors incompetent for jury service.

It is conceded that both the Clerk of Court and the jury commissioner from time to time during the period in question called for volunteers. Apparently that practice arose when certain citizens complained in the Press that they had never been called for federal jury service. In any event, the practice of calling upon various persons to canvass their organizations for individuals who would be willing to serve upon the federal jury prevailed. Some persons appeared personally before the Clerk of Court and volunteered their services as jurors. No one contends, however, that these volunteers sought jury service for any ulterior purpose, or with the idea of being selected as jurors on any particular panel. It is fair to assume that such volunteers were prompted solely by a bona fide desire to have the experience of serving as jurors in federal courts, and the officials presumably faced with the never-ending problem of obtaining jurors in a large metropolitan area availed themselves of that method which seemed to facilitate their trying and burdensome search for available jurors. The Court's at-

tention has not been called to any Illinois statute which precludes the use of volunteers for jury service other than Section 13, Chapter 78, Illinois Revised Statutes, which provides that when a venire is exhausted and the Sheriff must summon talesmen, volunteers must not be accepted. Under such circumstances, the statute provides that

> "Any person who seeks the position of a juror, or who asks any attorney or other officer of the court or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge. Any attorney or party to a suit pending for trial who shall request or solicit the placing of any person upon a jury, shall be deemed guilty of a contempt of the court and be fined not exceeding one hundred dollars ($100.00), and the person so sought to be put upon the jury shall be disqualified to serve as a juror for sixty days."

But regardless of any specific statute which precludes the use of volunteers on a jury list, it is generally recognized that the selection of jurors must be carefully guarded so that men and women who perchance may have ulterior purposes are not permitted to volunteer for jury service. Many States have strict injunctions against anyone being permitted to serve as a juror if he volunteers. But here there is an absence of any showing or contention that any of the so-called volunteers sought jury service because they wanted to sit as grand or petit jurors in any matters pertaining to these defendants or for any improper purpose. It is the system which may lead to abuses that the law condemns, and it does not necessarily follow that a volunteer may not be a perfectly competent juror. The fact that a juror has volunteered for jury service in response to a request of the Clerk of Court or the jury commissioner does not imply that such person may have some philosophy

to forward law enforcement against those charged with crime, or to aid those accused of crime. Their willingness to serve may be prompted by a high sense of duty as citizens. The term "volunteer" should not include those who are recommended for jury service by postmasters, or other jurors, or by individuals connected with various groups, in absence of a showing that the prospective juror submitted to the officials a request that his or her name be sent in for jury service. Moreover, non-volunteer prospective jurors to whom questionnaires were sent and who later inquired as to the delay in being called as jurors are not volunteers if they are subsequently put on the jury list by the Clerk of Court or jury commissioner. A fair analysis of the record would indicate that one member of the petit jury and five members of the grand jury were volunteers.

There is no showing or contention that the so-called volunteers were not men and women who were jurors fully competent as citizens to be on the jury panels in question. There is no showing that the use of volunteers, as far as this trial is concerned, precluded the defendants from having a grand jury or a trial jury composed of men and women who were truly representative of a cross-section of the community from which the jurors were drawn. There is no showing that the use of volunteers resulted in the intentional or negligent exclusion or discrimination against any individuals or groups of individuals. We have a situation here, therefore, where the grand and petit juries are completely invulnerable from attack, except that some of them volunteered for jury service. Although the use of volunteers in obtaining jurors for federal courts may not be approved because of the inherent dangers in employing such a method, there is no evidence that the acceptance of volunteers in this District excluded any cognizable group or deprived these defendants of the type of grand or petit

jury which measured up to the standards set forth in *Glasser* v. *United States, supra.* See also *Dow* v. *Carnegie-Illinois Steel Corporation,* 3 Cir., 1955, 224 F. 2d 414.

The other matter raised by the motion pertains to the alleged delegation of duty in the selection of jurors by the jury commissioner, Mr. Crooks, to an assistant in Mr. Crooks' private business. In considering this aspect of the motion, one must recognize that there are many ministerial duties in the selection of jurors; that is, in sending out inquiries to various organizations for a list of their members who are eligible for jury service, the utilization of a questionnaire in following up the names thus submitted, the canvassing of the questionnaires to determine whether the prospective jurors are eligible for service or otherwise. Jury commissioner Crooks delegated many of these ministerial duties to an assistant, Mr. Richard Jongsma, but the list of jurors which was finally submitted by the jury commissioner to the Clerk of Court was approved by him. Mr. Crooks was the official who made the decision as to the names that should be sent into the Clerk of Court as prospective jurors, although he delegated many of the ministerial duties to Jongsma. It seems reasonably clear that whatever Jongsma did in connection with the compilation of names for jury service, such work was done under the direct supervision of Mr. Crooks. True, a jury commissioner cannot delegate the authority vested in him under the law. He alone must be clothed with the final decision in determining the list of available jurors which should be sent to the Clerk of Court, but a delegation of ministerial and routine duties of a jury commissioner in screening out the ineligible from the eligible does not prevent the jury commissioner from exercising his judgment as to the list of names which shall finally be submitted to the Clerk of Court. And whatever work Mr. Jongsma did in assisting Mr. Crooks, there is no showing that it resulted

in any arbitrary exclusion of any class of people, or any discrimination against any class or groups of people. And there is no showing that the performance of such ministerial duties by Mr. Jongsma did not afford a list of jurors which were a fair and impartial cross-section of the community. To condemn, therefore, as an illegally constituted grand or petit jury by reason of the work that Mr. Jongsma did in assisting the jury commissioner, seems unwarranted. Suppose, for instance, that a postmaster was asked to submit a list of prospective names of jurors to the Clerk of Court, and if in a postmaster's investigation he eliminated certain names and exercised his discretion in compiling the final list submitted to the Clerk, and if the Clerk, after reviewing the list, determined that the men and women were eligible for jury service, it could not be urged that the utilization of the postmaster's services as indicated was in any way an unlawful delegation of the duties which rested upon the Clerk of Court. The assumed situation is fairly comparable to the present one. There is no showing here that the final approval of the names submitted for jury service did not rest with the jury commissioner. That is determinative of any objection to the system which was followed.

The Court concludes, therefore, that the motions of the defendants, and each of them as noted above, must be and the same hereby are in all things denied. It is so ordered. An exception is allowed.

Dated this 20th day of August, 1958.

Enter:

Gunnar H. Nordbye,
United States District Judge.

APPENDIX D.

ACCOUNTS RECEIVABLE

Sales, 11/24/44 - 12/31/44 (Price adjustment)			29837.00	
Less, corrections in invoices				
# 57463, shown $ 5761.00 Dr. by		1080.00		
742889 "	783.00	1176.00		
	$ 11033.00	9756.00	8846.00	
Net sales, 1944				91010.60
Collections, 1944				11700.00
Balance due, 12/31/44				9310.60
Sales, 1945: (Price adjustment)				
1/1/45 - 7/31/45			91695.50	
6/1/45 - 11/30/45 (denominified appreciations)			85786.30	
11/30/45 - 12/31/45			26513.30	204105.10
				213415.70
Collections, 1945				198029.84
Balance due, 12/31/45				14985.86
Sales, 1946:				
Price adjustments		1379.80		
Unbilled shipments		6534.66	7914.46	
Less, items unsold and due to financial difficulties			4864.70	
Net sales, 1946				15049.54
				16029.40
Collections, 1946				16802.94
Balance due, 12/31/46				-773.54

CASH ACCOUNT

	1944	1945	1946
RECEIPTS (Collections)	$ 11700.00	$ 1984798.46	$ 1680294.00
Bal. fwd.		11700.00	161798.46
	11700.00	1996498.46	1842092.46
DISBURSEMENTS:			
Chocolate		450000.00	
Milk		300000.00	150000.00
Corn Syrup		170000.00	87775.00
Cocoa Beans		30000.00	
Lyman bean deal		300000.00	
Finger deal		370000.00	548850.00
Sales Expenses (Installments)		180000.00	204661.46
TOTAL DISB.		1950000.00	1791286.24
CASH BALANCE	11700.00	46798.46	50808.22
Deposited in Bank 1/5/46			50809.00

5611

ANALYSIS OF TRANSACTIONS BETWEEN SHOTWELL AND DAVE LUREN, (GEN COUNSEL EARLY) 1944

Invoice No	Date	Invoice Amount	Net Weight	Description	Shotwell Recorded Per Lb.
A 24487	8/8/44	$ 1501.30	10000#	Cocoa powder	—
			5010	Cotton drops	—
23608	8/12	651.30	5010	Cotton drops	—
51010	11/9	618.75	7500	Spice Cottons	—
51777	11/13	1086.75	13420	Spice Cottons	—
51884	11/17	980.20	11760	Spice Cottons	—
51878	11/16	744.980	9030	Spice Cottons	—
51607	11/20	1133.55	13740	Spice Cottons	.10
51491	11/22	845.67	10590	Spice Cottons	.10
51939	11/25	1259.778	15270	Spice Cottons	.10
52163	11/27	137.566	10802	Cotton drops	.10
52388	11/30	1868.382	11264	Cotton drops	.10
55915	12/6	1557.75	20100	Gum drops	.10
52159	12/8	1837.45	23336	Gum drops	.10
52492	12/9	1557.75	20100	Gum drops	.10
57659	12/12	1818.15	23460	Gum drops	.10
60254	12/26	1587.98	20490	Gum drops	.10
TOTAL (Recorded Sales)		14031.33			

Added from X records:

27973	9/8	651.30.
31532	9/21	595.00.
33344	8/10	74.38
35873	8/21	159.38
38167	9/2	152.00
TOTAL (Recorded Sales)		1633.06

X 1961 11/15

X 1979 1/6

Completion of Price Adjustment	Memo Entries from Luboviz Record			
Total	H.S. Records	H.S. Added	Paid To Shotwell	Paid To Others
	$ 1501.30	$ —	$ 1501.30	
	651.30	—	651.30	
	1368.75	750.00	618.75	$ 750.00 (Luboviz)
	1746.65	174.00	1024.65	
	2146.70	1176.00	970.70	
	1604.98	903.00	701.98	
B 1374.00	2507.55	1374.00	1133.55	
1059.00	1941.68	1059.00	882.68	
1521.00	2716.75	1527.00	1189.75	
1030.70	681.05	241.00	(1440.65)	1440.65
1176.40	7096.25	5832.00	(1264.25)	1264.25
20.00	3567.75	2010.00	1557.75	
33.80	2.85.45	33.53.00	182.745	
20.00	3527.75	2010.00	1557.75	
23.40	4168.15	2346.00	1818.15	
20.80	3631.98	2049.00	1587.98	

	15.00	—	651.30
	9.500	—	595.00
	74.38	—	74.38
	159.38	—	159.38
	153.00	—	153.00

675.00 (Luboviz)

1150.00 B. to Luboviz

TOTAL (Used on Disclosure Page) $ 5970.00

3

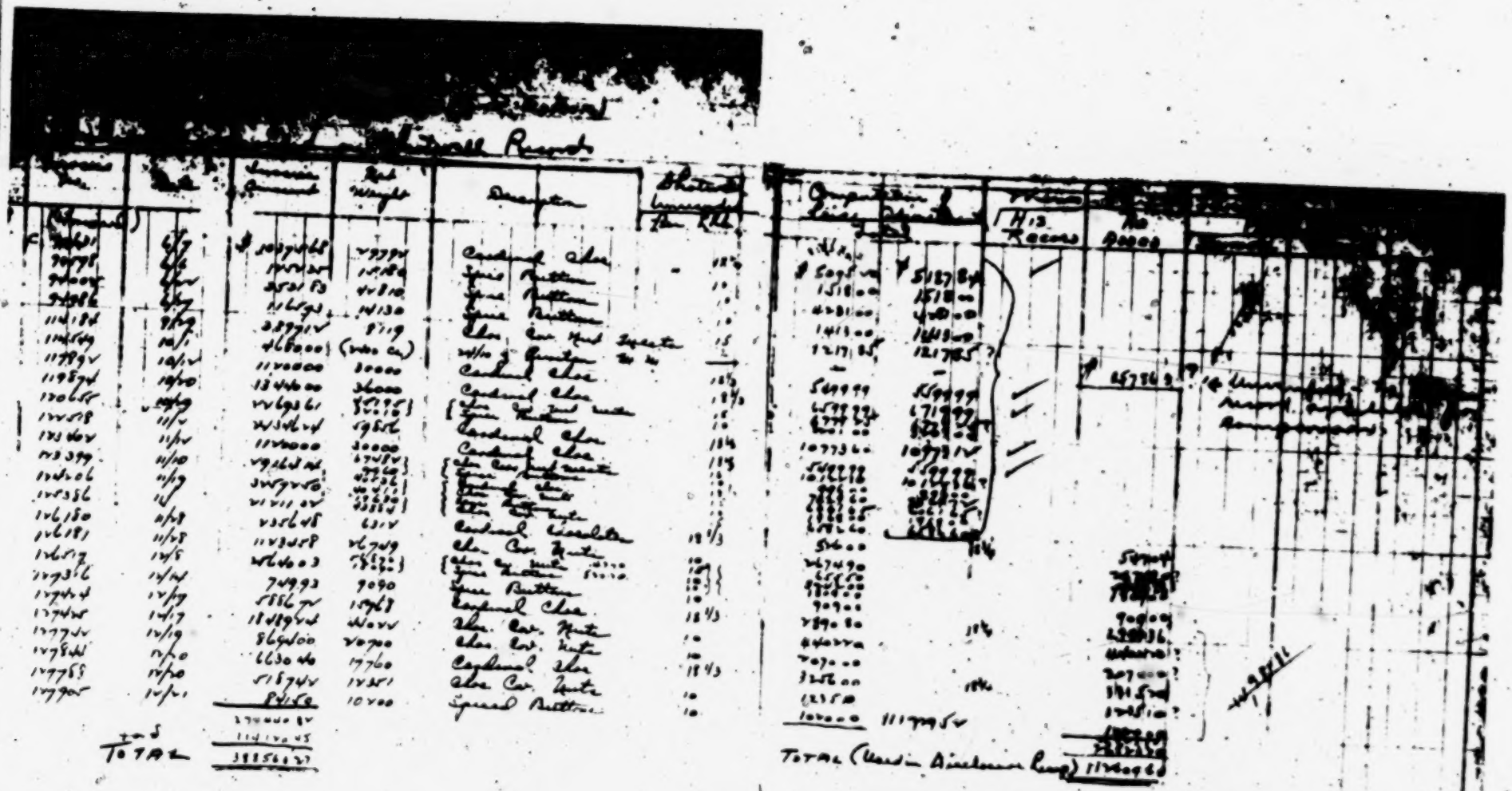
3091

#2
3099

Analysis of Transactions, Between Shotwell and Dave Lubben, (Gen Contr., Eatsum)
1945

Sales as recorded on Shotwell Records

Invoice No.	Date	Invoice amount	Net weight	Description	Shotwell Invoice Extended	Per lb.	Competition & Price Adjustments	Total	Mine Tailings Items	Shotwell Records	Paid To Shotwell	Paid To Others	Shipped To
C 65052	1/5	$ 269700	34500	Lime Escape				345000		$ 617700	$ 345000	$ 272700 (Lime Escape)	
61904	1/9	140805	17310	Spec Buttons				173100		315908	173100	142808	
61502	1/10	125930	15400	Spec Buttons				154000		279130	154000	125730	
59981	1/13	110634	13410	Spec Buttons				134100		244733	134100	110633 (Lime Escape)	
63530	1/16	129938	15750	Spec Buttons				157500		287438	157500	129938	
60 76	1/16	128700	15600	Spec Buttons				156000		284700	156000	128700	
662 3	1/19	137875	16500	Lime Escape				165000		302875	165000	137875 (Lime Escape)	
61259	1/20	108345	13950	Lime Escape				139500		248145	139500	108645 (Lime Escape)	
685	1/16	103463	13350	Lime Escape				133500	$	234963	133500	101463 (Lime Escape)	
70152	1/16	115583	14010	Spec Buttons				140100	16405.00	255683	140100	115583	
70252	1/21	108900	13500	Spec Buttons				135000		240900	135000	108900	
70452	1/23	145500	18000	Spec Buttons				180000		325500	180000	145500 (Lime Escape)	
70653	1/23	120038	14550	Spec Buttons				145500		265538	145500	120038	
71155	1/24	121078	14670	Spec Buttons				146700		267778	146700	121078	
71150	1/25	109973	13590	Lime Escape				135900		245873	135900	109973	
71775	2/1	111368	13770	Lime Escape				137700		249068	137700	111368	
72133	2/3	366529	44670	Spec Buttons				446700		815598	446700	368898 (Lime Escape)	
73448	2/3	120665	14460	Lime Escape				144600		265265	144600	120665	
74510	2/14	123355	14940	Spec Buttons				149400		272755	149400	123355	
75079	2/21	111368	13770	Lime Escape				137700	12760.00	249068	137700	111368	
75504	2/13	111368	13770	Lime Escape				137700		249068	137700	111368	
76054	2/18	115320	14880	Lime Escape				148800		264120	148800	115320	
77130	2/14	100620	77400	Victoria Escape				77400		178020	77400	100620	
77249	2/15	117513	14550	Spec Buttons				145500		271013	145500	122513 (Lime Escape)	
77 V	2/15	114078	13830	Spec Buttons				138300		252946	138600	114346	
77413	2/15	201660	24850	Pearl Escape				248500		301850	101350	201600	
77523	2/16	283500	35000	Cookie Box				350000		575260	226650	355610 (Lime Escape)	
77602	2/17	283500	35000	Cookie Box				350000		633516	168300	339916	
78603	2/1	131626	16200	Spec Buttons				162000		299250	162000	133650	
78	2/	218520	27000	Cookie Box				270000	13685.00	401600	135000	266800	
79	2/	120393	14850	Lime Escape				148500		239493	134700	104393	
79	2/	112500	13500	Spec Buttons				135000		168500	56500	112000	11th Barrow Eatsum
79	2/	123503	15246	Lime Escape				152460		271003	147900	123503	
80	2/	280137	34566	Lime Escape				345660		496134	216000	280134	
80	2/	273857	33810	Cookie Box				338100		507007	234150	272857	
A 80	2/	112000	10000	Victoria Escape				100000		168500	56500	112000	5th Barrow Eatsum
79	2/20	360192	9605	Spec Buttons				96050		529192	180900	360192	
80	2/21	154601	19080	Lime Escape				190800		320101	165200	154601	
A 79	2/21	118272	2 65	Landmark Escape				26500		177672	59400	118272	
81	2/21	97664	12060	Landmark Escape				120600	18471.00	148710	49050	97664	
81	2/21	286730	35400	Victoria Escape				354000		430730	144000	286730	
81	2/23	249686	30810	Landmark Escape				308100		457986	207600	249686	
81	2/23	314043	38760	Victoria Escape				387600		584043	270000	314043	
80	2/9	68063	8550	Lime Escape				85500		150563	85500	68063	
80	2/	171673	21150	Spec Buttons				211500		388578	216900	171673	
81	2/	113228	13980	Lime Escape				139800		253328	140100	113228	
81	2/									not Recorded			
81	2/3	106920	13200	Lime Escape				132000		238920	132000	106920	Eatsum
55	2/	181710	22440	Victoria Escape				224400		407110	225750	181710	
A 55	2/	136755	16830	Lime Escape				168300		305055	168300	136755	
79	2/	1055205	13040	Lime Escape				130400		235605	130400	105205	
	(Summary)	1											



5619

3094

13100

31045

...Transactions between ...
...Co. and Dept. Labor (Con. Corp, Boston)
1946

Orders as recorded on Hotwell Records

Invoice No.	Date	Invoice amount	Net Weight	Description
C 13014	1/10	# 1180176	14587 #	Aloe Cac Knots
13164	1/16	1414764	14643	
13468	1/19	1058190	12600	Aloe Co. Cardinal - 4 no Spun Dyed
14 285	1/21	5836 14	10890	Aloe Cac Knots
14 305	2/5	1158 40	10880	Aloe Dyed
14 858	4/14	1583 54	3174	Aloe Cac Knots
14 817	4/20	1646 93	19690	Spun Dyed
15 086	4/15	3449 30	5165	Aloe Cac Knots
15 1 14	4/8	1744 40	14490	Aloe Dyed
15 184	4/13	4558 13	9370	Cardinal
15 096	4/17	1647 50	14000	Aloe Dyed
15 904	4/14	4501 56	10 - 8	Aloe Cac Knots
A 15 930	4/10	6044 35	8490	Cardinal Corp.
15 961	4/10	1934 50	21000	Spun Dyed
15 038	4/15	1409 60	11880	Aloe Cac Knots
A 15 080	4/15	3148 61	24660	Aloe Dyed
15 904	4/14	6000 20	13970	Aloe Cac Knots
15 [illegible]	4/20	4647 44	6693	Aloe Cac Knots
A 15 06	5/1	80 [illegible]	[illegible]	Cardinal
[illegible]	5/1	5506 50	14977	Aloe Cac Knots
A [illegible]	5/6	[illegible]	10444	Cardinal Aloe
[illegible]	5/6	6300 00	30000	Celeste fiber
[illegible]	[illegible]	[illegible]	[illegible]	Celeste fiber
[illegible]	6/14	[illegible]	[illegible]	Celeste fiber
[illegible]	6/28	[illegible]	[illegible]	Celeste fiber
[illegible]	7/3	1649 20	305 -	Cel fiber
[illegible]	7/10	[illegible]	[illegible]	Cel fiber
[illegible]	7/8	[illegible]	[illegible]	Cel fiber
[illegible]	7/16	[illegible]	[illegible]	Cel fiber
[illegible]	7	[illegible]	[illegible]	Cel fiber
[illegible]	[illegible]	[illegible]	[illegible]	Cel fiber
[illegible]	[illegible]	[illegible]	[illegible]	Cel fiber
[illegible]	[illegible]	[illegible]	[illegible]	Cel fiber
[illegible]	7/30	[illegible]	[illegible]	Cardinal
[illegible]	7/31	[illegible]	[illegible]	Cardinal Cardinal
A 19 6015	[illegible]	[illegible]	[illegible]	Cardinal
A [illegible]	[illegible]	[illegible]	[illegible]	Cardinal
[illegible]	[illegible]	[illegible]	[illegible]	Cardinal
[illegible]	[illegible]	[illegible]	[illegible]	Cardinal
[illegible]	8/13	[illegible]	10000	Cornel Mixt
[illegible]	[illegible]	[illegible]	[illegible]	Cornel Mixt
[illegible]	[illegible]	[illegible]	[illegible]	Cotton Candles
[illegible]	9/10	1662 75	7016	Cardinal
18 7197	9/	1404 60	10000	Cornel Mixt
18 7196	10/21	1404 40	10010	Cornel Mixt
18 7198	11/25	632 16	1704	Cardinal
[illegible]	[illegible]	[illegible]	[illegible]	Cornel Mixt
18 7 35	10/21	1404 40	10010	Cornel Mixt
19 13 03	11/6	1967 16	11700	Cardinal
19 604	11/15	665 18	[illegible]	[illegible]
19 6511	[illegible]	2757 43	[illegible]	[illegible]
	(Amount)	2 [illegible]		

Hotwell Corporation				Memo	Invoice
Consolidated Bonny Co. Invoice					
Due 15th	Final				14 Spun
16	# 368805			# 3688 05	
15	4453 95			4453 95	
13	4638 00			4638 00	
12	1320 00			1320 00	
10	1389 70			1389 70	
10	1453 00	4965 40		1488 40	
	1989 00			1989 00	
	1224 75			1224 75	
	2267 00			2267 00	
5½	1991 00			1991 00	
	2700 00	833775		2700 00	
	2100 00			2100 00	
13½	5478 80			5478 00	
	2700 00			2700 00	
	2100 00			2100 00	
	3966 00	7697 80		3966 00	
10	1395 00			1395 00	
10	2397 00			2397 00	
8½	4023 00	11781 00		4023 00	
	2052 00			2052 00	
5½	3375 00			3375 00	
5	1875 00			1875 00	
5	2070 00			2070 00	
10	3441 00	14711 00		3441 00	
10	1917 00			1917 00	
8	3081 00			3081 00	
10	2433 00			2433 00	
10	2823 00			2823 00	
10	2100 00	14751 00		2100 00	
	3470 00			3470 00	
10	1365 00			1365 00	
10	1002 00			1002 00	
13½	7241 00	11076 40		7374 08	
	9378 00		11½	811576	
	7 [illegible] 50		11½	7 [illegible] 36	
	4114 00		11½	418850	
10	1002 00			1002 00	
5	500 00			510 00	
13	9769 60			9378 00	
	1012 00			1002 00	
5	500 00			500 00	
13	[illegible]			3195 0	
	[illegible]			[illegible]	
	[illegible]			[illegible]	
	9612 00		11½	9837 00	
	1664 00			1664 00	
10	1874 00			1874 00	
	3200 00	11861 90		3200 00	
	131287 50			131193 80 Total	

Invoiced from Cuban firm & financial diff
$48,614.20
5629

[redacted] [redacted] Co. Corp., Elmsun

[redacted] Abstract Records

Invoice No.	Date	Invoice amount	Net Weight	Description
Forward				
197715	11/16	1189183	10680	Spun Rayon
197900	11/20	317500	2975	Spun Rayon
A-197137	11/16	33603	1340	Spun Rayon
197841	9/16	16000.00	5000.	Spun Rayon Blend
170782	9/11	406947	2500	Lisle Blend
187191	10/19	1174986	18791	Cotton Dyeing
191503	10/11	3077698		Cotton Dyeing
		7316061		
	Less	2631264.07		
	TOTAL	3351825.68		

Material Quotation & Surrender Rate Adjustment	Memo (Monthly) No Pieces	Insurance
Total		
" $ 1368.00	$ 1368.00	
" 1343.00	1343.00	
" 1341.00	1341.00	
" —	—	
44% 3700.00	3700.00	Unverified - do Rubber record for comparison
" —	—	
" — 7732.00	—	
	7732.00	
Forward	1351918.64	
TOTAL (Used in Insurance Recap)	1359298.64	

SHIPMENTS NOT BILLED:-

8/20/46	335 Cones	Comet Yarn @	$ 7.70 Cone	2441.00
7/15/46	1646	Cardinal	8.96	14751.00
6/8/46	70	"	8.96	627.20
5/14/46	1989	"	8.96	17821.44
3/6/46	600	Citrus Drop	3.75	2250.00
"	400	Spun Drop	2.25	900.00
3/9/46	456	Citrus Drop	3.75	1710.00
"	571	Spun Drop	2.25	1284.75
"	7	Spun Bottom	2.55	17.85
3/5/46	1150	Cardinal	7.70	9000.00
3/4/46	1000	Spun Bottom	2.55	2550.00
8/9/46	1720	Cardinal	7.70	12398.00 65736.44

TOTAL (Used in Insurance Recap) 65736.44

APPENDIX E.

Excerpt from Cross-Examination of H. Stanley Graflund on the Remanded Hearing.

(App. 1198-1204.)

Q. All right. Now on the same afternoon, August 28, 1956, Volume 21 page 41, were the following questions asked and did you make the following answers—

Those answers I read you you made, didn't you? You made all those answers I have just read?

A. That is correct.

Q. Now, please listen to these:

"Q. Did you have any conversation with Mr. Busby on your trip back—"

Referring to this time you had been East in January of 1948.

"A. I did.

"Q. What was the substance of that conversation and when was it that you came back?

"A. We came back the—I believe on Sunday, on the Century, bringing us into Chicago on Monday morning, as I recall.

"Q. What month was that?

"A. The month of January, 1948.

"Q. All right, sir.

"A. As I recall, it happened in the club car. I related to Mr. Busby the fact that Shotwell was engaged in dealings with Mr. Lubben and receiving cash which was not reflected on the books. Mr. Busby gave a long whistle and swore, I believe, and said it could be serious, or words to that effect.

"Q. Did you go into detail with him as to—

"A. I told him how Lubben had come into the office and had from time to time left money which had been kept in the office.

"Q. Did you tell about the box?

"A. About the cash box? I could have.

"Q. How it was handled?

"A. Whether we went into the great detail, I don't know. The substance was the dealings with Lubben on money, that money came in which was not recorded and used for the purpose of corn."

I assume you actually said "purchase", and it is transposed here into "purpose."

"A. I don't recall I discussed anything of the City National Bank box at that time, or necessarily the box, this separate box, just that it was kept at the office.

"Q. After you reached Chicago, did you have occasion to discuss that any further with Mr. Busby?

"A. I don't believe so.

"Q. Did you have occasion to discuss it with anyone else, Mr. Huebner or Mr. Sullivan?

"A. I do not think I did, Mr. Russo.

"Q. Was there any report made to Cain by Busby of your conversation?

"A. If there was I was not apprised of it.

"Q. Did you learn some other time from anyone that he had discussed it with Mr. Cain or Mr. Huebner or Mr. Sullivan?

"A. I believe Mr. Busby told me at a later date he discussed the matter with Mr. Cain.

"Q. How much of a later date was that?

"A. I would say about the time in late February, about that time, late February.

"Q. Late February.

"A. About the time the company was buying the Habercorn property."

Were those questions asked and did you make those answers under oath?

A. I did.

Q. And in that testimony you not only say you told Busby on the Century in a club car, and that he whistled, that he swore, that he said it could be serious, and entirely apart from that a month or so later, in February, he told you that he had taken the matter up with Cain; isn't that correct? You are relating in there not one conversation but two, isn't that correct?

A. That is correct.

Q. Now, were these questions asked and did you make these answers under oath, page 52, on this same day, August 28, 1956:

"Q. When you told Mr. Busby in the club car on the way back to Chicago about these over-ceiling payments, what was his demeanor? What was it?

"A. Well, Mr. Busby was a little bit poker faced. It is hard to tell. He gave a low whistle and swore.

"Q. Did he appear shocked?

"A. Well, if he appeared shocked, it was not too great. I mean, he did not fall out of the chair.

"Q. In other words, it is fair to say it was not even evident?

"A. He was impasse."

I assume—it appears in here as "impasse," i-m-p-a-s-s-e, but I assume that what you actually said, and there was an error, was that he was impassive, i-m-p-a-s-s-i-v-e.

Were those questions asked and did you make those answers under oath?

A. I did.

By Mr. Christensen: Page 56.

By Mr. Christensen:

Q. On the same day, before the same jury, under oath, in what you knew was a solemn matter, were these questions asked and did you make these answers:

"Mr. Russo: On the trip back with Mr. Busby from Mr. Lubben's farm, do you recall whether or not at that time you discussed with Mr. Busby the fact of over-ceiling, not over-ceiling, but unbilled shipments?

"A. I believe they could be covered in general discussion.

"Q. Do you have any recollection of covering them in that discussion.

"A. I believe they were. I think so, because that was one of the uppermost subjects in my mind.

"Q. So, you did discuss the unbilled shipments and disclosed them for the first time to Mr. Busby on that trip from Lubben's farm back to Chicago?

"A. Yes.

"Q. When you told him about it, about the unbilled shipments, what was his reaction at that time, if you have any memory of it?

"A. Well, as I say, Mr. Busby was not—he did not have a very expressive face—more or less taciturn or impassive. He just sat there and sipped his martini."

Were those questions asked and did you give those answers under oath?

A. I did.

Q. Two days later, on August 30, 1956, Volume 23, page 72—71, I beg your pardon:

"Q. Mr. Graflund, you testified previously about a trip back to New York in January of 1948 and Mr. Busby accompanied you on that trip?

"A. That is correct.

"Q. On the way back you told him about moneys received by Shotwell; that money, at least to your knowledge, they received?

"A. That is correct.

"Q. Did he give a little whistle, or, in your opinion, was he really surprised at the information you were giving him?

"A. Well, he didn't fall off the chair, I will say that."

Were those questions asked and did you make those answers under oath?

A. I did.

Q. On those several occasions in 1956?

A. Yes, sir.

Q. Mr. Witness, how vivid, how clear that testimony is. What a clear picture you had when you gave it in the club car, not any car—you saw Busby sitting there, sipping a martini, he swore, he whistled. He said you might be in serious trouble.

Why is it that you had such a clear and vivid picture of surrounding circumstances as to that and you couldn't tell me yesterday any of the surrounding circumstances of when you now say it took place, in June 1948, after Sam Krane had been in there?

A. Did you want me to answer that, sir?

Q. Yes.

A. Well, No. 1, the answers that I gave at that time were to the best of my recollection, and my honest answers. Subsequently, upon review in my own mind, I recalled that it was Mr. Busby who had told me of the conversation on the train and I had accepted that as fact.

Mr. Busby and I had been drinking and I wasn't sure what had been said and I repeated what Mr. Busby told me had taken place on the train. Whenever I was asked,

I said that the conversation took place on the train but I had no distinct knowledge of it. Now, that is the reason.

Until I have recalled this visit to Mr. Busby's home, it hit me then, and that is the reason why I changed my testimony at the following grand jury, because, up to then, Mr. Christensen, I had no way or no recall of that particular meeting and when I met—when I recalled that incident, I then changed my testimony, but only then.

Q. I see. I see. And is your story now that you gave all this testimony under oath as your direct vivid recollection, that you knew might result in an indictment to citizens, simply because Busby had told you something?

A. I believed him.

Q. That is why you did it, simply because Busby told you that?

A. That is correct. I believed him.

Q. That is your explanation?

A. That is correct.

Q. All right. Now, did Busby tell you that he sat there with a taciturn face?

A. No, sir. I remember Busby's face.

Q. Just a minute.

A. All right, sir.

Q. Did Busby tell you that when he heard this he was impassive?

A. No, sir.

Q. Did Busby tell you when he heard this he just sat there and sipped that martini?

A. No, sir.

Q. But that is what you swore happened at a time when you knew you might be getting an indictment against citizens, isn't it?

A. Yes, sir.

APPENDIX F.

Excerpts from Statements of the Disclosure Policy.

1. "Taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started'." (Statement of Secretary of the Treasury Morgenthau, May 28, 1945, R. 19.)

2. "* * * the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. *And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'.*" (Secretary of Treasury Vinson, Aug. 21, 1945, R. 19.)

3. "Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases." (Press Release of Treasury Department, October 5, 1945, R. 3132.)

4. "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. * * * *The simple statement that 'I have filed false tax returns and I want to make the Government whole' would constitute a complete disclosure.*" (Italics added.) (Address by J. P. Wenchel, Chief Counsel of the Bureau, publicly released by Treasury, May 14, 1947, R. 3134, 3136.)

5. "One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order *to assure himself against criminal prosecution*, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case." (Italics added.) (Press Release by Secretary of the Treasury Snyder, May 25, 1947, R. 3140.)

APPENDIX G.

Composition of the Grand and Petit Juries and Source from Which Jurors Selected.

1. GRAND JURY:

(a) *Selections Made by Roy H. Johnson.*

May Bourne ..... recommended by former petit juror (Johnson Affidavit)

Mathew Classen ..... recommended by former grand juror (Johnson Affidavit)

Mary Jane Henning ..... recommended by former grand juror (Johnson Affidavit)

Robert J. McWalter ..... recommended by former grand juror (Johnson Affidavit)

Louis W. Northway ..... recommended by former grand juror (Johnson Affidavit)

Euphemia Parker ..... recommended by former grand juror (Johnson Affidavit)

Marion O. Rose ..... recommended by former grand juror (Johnson Affidavit)

John Oscar Karlson ..... volunteer (Johnson Affidavit)

Clarence Kruse ..... volunteer (Johnson Affidavit)

Lucille McDermott ..... perhaps a volunteer (Johnson Affidavit)

(b) *Selections Made by Richard Jongsma.*

Hazel S. Underhill ..... volunteer (Johnson Supp. Aff.)

Wm. K. Mahn ..... volunteer (Johnson Supp. Aff.)

John J. Jachera ..... volunteer (Johnson Supp. Aff.)

Emma A. Schlieckert ..... volunteer (App. 318, Cain Ex. 1B and 1C)

Roy L. Pierce.....telephone book (App. 331)
Fred Albly.....telephone book (App. 331)
Alexander C. Rice.....telephone book (App. 321)
James C. Delaney.....volunteer (App. 321-2)
Mae W. Peterson.....volunteer (App. 323-4)
Grace M. Lundholm.....volunteer (App. 325-6)
Jesse Devers.....telephone book (App. 326)
John Van Antwerp.....telephone book (App. 326)
Gust Uddman.....telephone book (App. 326)

2. Petit Jury.

(a) *Selections Made by Roy H. Johnson.*

Francis R. Schubert...recommended by former petit juror (Johnson Supp. Aff.)
Margaret M. Capinegro.recommended by former petit juror (Johnson Supp. Aff.)
Jean F. Lawler.....Illinois Opera Guild List (Johnson Supp. Aff.)
Ruth L. Schiller.....League of Women's Voters List (Johnson Supp. Aff.)
Harry Marshak.....recommended by another individual (Johnson Aff.)
Leroy J. Ryan.....recommended by former grand juror (Johnson Aff.)
Stanley Grzwacz.....recommended by former grand juror (Johnson Aff.)
Rose Blondin (alternate)..League of Women's Voters List (Johnson Aff.)

(b) *Selections Made by Richard Jongsma.*

Ethel A. Gassen.....volunteer (App. 329)
Arthur Amodeo.....telephone book (App. 335)
Anthony Massero.....telephone book (App. 336)
Helen Sajewski.....telephone book (App. 337)
John E. Jasch.....telephone book (App. 336)
Wm. A. Schmidt (alternate)....telephone book (App. 334)

APPENDIX H.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U. S. C. (1952 Edition).

"§ 1861. *Qualifications.*

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless: * * *

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held. (June 25, 1948, ch. 646, § 1, 62 Stat. 951.)"

• • • • •

"§ 1864. *Manner of drawing; jury commissioners and their compensation.*

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

• • • • •

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia. (June 25, 1948, ch. 646, § 1, 62 Stat. 952.)"

Ill. Rev. Stats. 1951, Ch. 78:

"§ 13. When by reason of challenge in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel is exhausted, the court may direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial, but upon objection by either party to the cause to the sheriff summoning a sufficient number of persons to fill the panel, the court shall appoint a special bailiff to summon such person: Provided, the same person shall not be appointed special bailiff more than once in sixty days. Any person who seeks the position of a juror, or who asks any attorney or other officer of the court, or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from

serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge. Any attorney or party to a suit pending for trial who shall request or solicit the placing of any person upon a jury, shall be deemed guilty of a contempt of the court and be fined not exceeding one hundred dollars ($100.00), and the person so sought to be put upon the jury shall be disqualified to serve as a juror for sixty days. [As amended by act approved June 21, 1933. L. 1933, p. 684. In force Jan. 1, 1934.]"